Koh Siew Keng (P) & Anor v Koh Heng Jin

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04–81 OF 2005
GOPAL SRI RAM, LOW HOP BING AND WAN ADNAN MUHAMAD JJCA
17 JANUARY 2008

Banking — Banker and customer — Account of deceased customer — Joint account — Whether joint account holders hold monies in account as joint tenants in absence of contrary intention — Whether monies in account pass to surviving tenant upon death of one joint tenant — The jus accrescendi

Civil Procedure — Appeal — Facts, finding of — Concurrent findings of fact — Failure by subordinate trial court to properly evaluate evidence — Such failure overlooked by High Court — Whether Court of Appeal obliged to intervene

Civil Procedure — Sessions court — Jurisdiction of — Exceptions to — Actions to enforce trusts — Whether action by true owner to recover monies misappropriated by person accountable in equity would constitute an action to enforce trust — Whether sessions court seized with jurisdiction to try such action — Subordinate Courts Act 1948 s 69(e)

Equity — Restitution — Unjust enrichment — Action by beneficiary to recover monies misappropriated by executor — Whether such action constituted action to enforce trust — Whether such action would constitute action for restitutionary relief based on unjust enrichment

Limitation — Trusts — Limitation of actions in respect of trust property — Trustee, definition of — Fraud, wider sense of — Whether executor's misappropriation of monies belonging to testator would amount to equitable fraud or unconscionable conduct — Limitation Act 1953 s 22(1)(a) & (b)

Trusts and trustees — Administration of estate — Executor — Whether executor or personal representative of deceased testator would fall within definition of 'trustee' under the Trustee Act 1949

Words and Phrases — Subordinate Courts Act 1948 s 69(e) — 'enforce trusts'

Words and Phrases — Trustee Act 1949 s 2 — 'trust' — 'trustee'

In September 1970, the testator ('KHC') opened a joint bank account in Singapore. The co-holders of that account were his sons KHJ ('the respondent') and KHT. The testator died the same month, leaving his widow and the respondent as executors of his will. On 11 May 1971, KHT passed away. The respondent ('KHJ') thus became the only surviving holder of the account in question. The respondent did nothing about the account for some ten years. Then, on 22 October 1981, he withdrew for himself all the money in it — a sum of S$346,505.09. The testator's widow subsequently sued in the sessions court to recover 1/3 of the monies that the respondent had withdrawn from the joint account. She based her claim on an agreement entered into between the testator, the respondent and KHT that each was entitled to a 1/3 share of the sum in the joint account. That share, she contended, formed part of the residue, and, as the residuary beneficiary, she was entitled to it. The respondent countered the claim in three ways. First, he argued that the sessions court had no jurisdiction to try the action. This was because the widow was seeking to enforce a trust — an action which the sessions court had no jurisdiction over pursuant to s 69(e) of the Subordinate Courts Act 1948. Second, there had been an agreement between the three account holders that the survivor was to have the monies in the account. Third, the respondent submitted that the action was barred by limitation. The widow's claim was rejected in the sessions' court and in the High Court and hence this appeal.

Held, allowing the appeal with costs:

(1) Whenever a determination has to be made as to a court's jurisdiction, the truth of the matters alleged in the statement of claim or other pleading must be assumed to be true. In the instant case, in determining whether the sessions court had the jurisdiction over the appellant's (widow's) claim, it had to be assumed that all that was set out in the statement of claim accompanying the summons was true. In other words, it had to be assumed that there was an agreement as alleged and that the respondent held the testator's share in trust (see para 4); *Rediffusion (Hong Kong) Ltd v AG of Hong Kong* [1970] AC 1136 followed.

(2) The widow was not enforcing a trust in seeking to recover monies she claimed belonged to her. A trustee who uses a beneficiary's money has to account to the latter for it, just as a solicitor who appropriates a

client's money is a fiduciary who must account for it to the client. An action by such beneficiary or client, does not enforce a trust but is merely aimed to recover monies as had and received by the defaulting trustee or solicitor. Such an action would constitute restitutionary relief based on unjust enrichment (see para 5); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 6 referred.

(3) The words 'enforce trusts' in s 69(e) of the Subordinate Courts Act 1948 refer to an action by a beneficiary or beneficiaries, to compel trustees to perform the terms of the particular trust or settlement or to direct them to refrain from doing anything inconsistent with the terms of a trust. Such words do not refer to an action by the true owner to recover monies wrongly appropriated by a person whom equity holds accountable. In the instant case, the respondent was not a trustee of the monies he took from the joint account. He was a person who was accountable in equity to the widow (appellant) for the monies belonging to the testator. Therefore, the sessions court had jurisdiction over the subject matter of the widow's (appellant's) claim (see para 7).

(4) The respondent was not a 'constructive' or 'implied' trustee. The respondent was merely a person liable in equity to account for those monies to the widow (see para 9); *Paragon Finance Plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 followed and *Dubai Almunium Ltd v Salaam* [2002] UKHL 48 referred.

(5) When money is placed in a joint account in the names of two or more persons, then, in the absence of a contrary intention, they hold it as joint tenants. Upon the death of one of the joint tenants, that tenant's share goes to the survivor. This is known as the *jus accrescendi*. Thus, *in the absence of a contrary intention*, the monies, upon the death of the testator and KHT, would accrue to the respondent as absolute owner. However, if an intention is disclosed that all the depositors are to have equal shares or shares in some other proportion, then the account holders will be deemed to hold the monies as tenants in common. The *jus accrescendi* is not a feature of a tenancy in common (see para 14).

(6) On the facts, there was sufficient evidence to support the widow's contention that there was an agreement between the respondent and the testator that each account holder should have a 1/3 share in the monies. All these pieces of evidence taken together would lead only to the reasonable and probable conclusion that the testator was entitled to 1/3 share of all the monies in the joint account (see para 16).

(7) Though the respondent was neither a constructive trustee, nor a trustee under a resulting trust, as an executor and personal representative of the testator's estate he fell within the broader definition of 'trustee' given by the Trustee Act 1949. There was no doubt that he converted to his own

use monies not belonging to him. Therefore, s 22(1)(b) of the Limitation Act 1953 ('the Act') applied and the plea of limitation failed. Further, s 22(1)(a) of the Act would also apply equally to the facts of the case. The appropriation by the respondent of monies he knew belonged to the testator amounted at the very least to equitable fraud or unconscionable conduct. The respondent having committed a fraudulent breach of trust (having regard to the wider definition of trust), no period of limitation would apply (see para 20).

(8) Although the appeal concerned questions of fact in respect of which there had been concurrent findings, where, as in the instant case an appellant was able to demonstrate a failure on the part of the trial court to evaluate the evidence and to direct itself correctly on the law and such omission was overlooked by the High Court, the Court of Appeal would intervene and do so to correct a miscarriage of justice (see para 27).

[Bahasa Malaysia summary

Pada September 1970, pewasiat ('KHC') membuka akaun bank bersama di Singapura. Pemegang bersama akaun tersebut adalah anak-anak lelakinya KHJ ('responden') dan KHT. Pewasiat meninggal pada bulan yang sama, meninggalkan balunya dan responden sebagai wasi-wasi wasiatnya. Pada 11 Mei 1971, KHT meninggal dunia. Responden ('KHJ') oleh itu menjadi satu-satunya pemegang yang masih hidup terhadap akaun yang dipersoalkan. Responden tidak berbuat apa-apa mengenai akaun tersebut untuk selama sepuluh tahun. Kemudiannya, pada 22 Oktober 1981, dia mengeluarkan untuk dirinya kesemua wang di dalamnya — wang sejumlah S$346,505.09. Balu pewasiat kemudiannya menyaman di mahkamah sesyen untuk mendapatkan kembali 1/3 daripada wang yang responden keluarkan daripada akaun bersama. Dia mendasarkan tuntutannya atas perjanjian yang dimasuki di antara pewasiat, responden dan KHT bahawa setiap mereka berhak kepada 1/3 syer daripada jumlah di dalam akaun bersama tersebut. Syer tersebut, hujahnya, membentuk sebahagian daripada baki, dan, sebagai benefisiari bakian, dia berhak kepadanya. Responden membalas tuntutan tersebut dalam tiga cara. Pertama, dia berhujah bahawa mahkamah sesyen tidak mempunyai bidang kuasa untuk mendengar tindakan tersebut, ini adalah kerana balu tersebut memohon untuk menguatkuasakan amanah — tindakan yang mana mahkamah sesyen tidak mempunyai bidang kuasa berikutan s 69 (e) Akta Mahkamah Rendah 1948 (Akta 1948). Kedua, terdapat perjanjian di antara ketiga-tiga pemegang akaun bahawa yang masih hidup mesti mempunyai wang di dalam akaun. Ketiga, responden berhujah bahawa tindakan dihalang oleh had masa. Tuntutan balu ditolak di mahkamah sesyen dan di Mahkamah Tinggi dan maka rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Setiap kali penentuan yang mesti dibuat terhadap bidang kuasa mahkamah, kebenaran perkara yang didakwa di dalam pernyataan tuntutan atau pliding lain mesti dianggap benar. Di dalam kes ini, di dalam menentukan sama ada mahkamah sesyen mempunyai bidang kuasa ke atas tuntutan perayu (balu), ia mesti dianggap bahawa kesemua yang dinyatakan di dalam pernyataan tuntutan yang disertakan bersama saman tersebut adalah benar. Dalam lain perkataan, ia mesti dianggap bahawa terdapat perjanjian seperti yang didakwa dan bahawa responden memegang syer pewasiat di dalam amanah (lihat perenggan 4). *Rediffusion (Hong Kong) Ltd v AG of Hong Kong* [1970] AC 1136 diikut.

(2) Balu tidak menguatkuasakan amanah di dalam memohon untuk mendapatkan kembali wang yang didakwa dimilikinya. Pemegang amanah yang menggunakan wang benefisiari mesti menanggungnya, seperti peguam yang mengambil wang anak guaman adalah fidusiari yang mesti menanggungnya terhadap anak guaman. Sesuatu tindakan oleh benefisiari sebegitu atau anak guaman, tidak menguatkuasakan amanah tetapi semata-mata bertujuan untuk mendapatkan kembali wang seperti yang dipegang dan diterima oleh pemegang amanah yang mengingkari atau peguam. Tindakan sedemikian boleh membentuk relief pemulangan berdasarkan pengkayaan tak patut (lihat perenggan 5); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 6 dirujuk.

(3) Perkataan-perkataan 'enforce trusts' di dalam s 69(e) Akta 1948 merujuk kepada tindakan oleh benefisiari atau benefisiari-benefisiari, untuk memaksa pemegang-pemegang amanah melaksanakan terma-terma amanah tertentu atau penyelesaian atau untuk mengarahkan mereka menghalang daripada melakukan apa-apa yang tidak konsisten dengan terma-terma amanah tersebut. Perkataan-perkataan sedemikian tidak merujuk kepada tindakan oleh pemilik sebenar untuk mendapatkan kembali wang yang diambil secara salah oleh orang yang mana ekuiti menyatakannya sebagai bertanggungjawab. Di dalam kes ini, responden bukan pemegang wang yang diambilnya daripada akaun bersama tersebut. Dia adalah orang yang bertanggungjawab di dalam ekuiti kepada balu (perayu) untuk wang yang dimiliki oleh pewasiat. Oleh itu, mahkamah sesyen mempunyai bidang kuasa ke atas perkara tuntutan balu (perayu)(lihat perenggan 7).

(4) Responden bukan pemegang amanah konstruktif atau tersirat. Responden hanyalah seorang yang bertanggungjawab di dalam ekuiti untuk bertanggungjawab ke atas wang kepada balu tersebut (lihat

perenggan 9); *Paragon Finance Plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 diikut dan *Dubai Almunium Ltd v Salaam* [2002] UKHL 48 dirujuk.

(5) Apabila wang dimasukkan ke dalam akaun bersama di dalam nama dua atau lebih orang, oleh itu, di dalam ketiadaan niat bertentangan, mereka memegangnya sebagai penyewa sesama. Di atas kematian salah seorang penyewa bersama, syer penyewa tersebut dipegang oleh yang masih hidup. Ini dikenali sebagai *jus accrescendi*. Oleh itu, di dalam ketiadaan niat bertentangan, wang tersebut, atas kematian pewasiat dan KHT, akan terakru kepada responden sebagai pemilik mutlak. Walau bagaimanapun, jika niat dikemukakan bahawa kesemua penyimpan akan mempunyai syer yang sama banyak atas syer di dalam bahagian lain, oleh itu pemegang akaun akan dianggap memegang wang sebagai penyewa sesama. *Jus accrescendi* bukan ciri penyewa sesama (lihat perenggan 14).

(6) Atas fakta, terdapat keterangan yang mencukupi untuk menyokong hujahan balu bahawa terdapat perjanjian di antara responden dan pewasiat bahawa setiap pemegang akaun sepatutnya mempunyai 1/3 syer di dalam wang tersebut. Kesemua keterangan ini dikumpul bersama akan membawa kepada kesimpulan yang munasabah dan mungkin bahawa pewasiat berhak kepada 1/3 syer kesemua wang di dalam akaun bersama (lihat perenggan 16).

(7) Walaupun responden bukan pemegang konstruktif, dan juga bukan pemegang di bawah amanah berbangkit, sebagai wasi dan wakil peribadi estet pewasiat dia terangkum di dalam maksud yang lebih luas 'trustee' yang diberi oleh Akta Amanah 1949. Tidak terdapat kesangsian bahawa ia menukar untuk kegunaannya wang yang bukan miliknya. Oleh itu, s 22(1)(b) Akta Had Masa 1953 ('Akta tersebut') digunapakai dan rayuan had masa gagal. Selanjutnya, s 22(1)(a) Akta tersebut akan beraplikasi juga secara sama mengikut fakta kes. Pengambilan oleh responden terhadap wang yang dia tahu dimiliki oleh pewasiat merupakan sekurang-kurangnya fraud berasaskan ekuiti atau tindakan tidak berhati perut. Responden dengan melakukan penipuan kemungkiran amanah (setelah mengambilkira maksud luas amanah), tiada tempoh had masa akan beraplikasi (lihat perenggan 20).

(8) Walaupun rayuan berkaitan persoalan fakta berkenaan di mana terdapat dapatan serentak, di mana, seperti di dalam kes ini, perayu boleh menunjukkan kegagalan mahkamah bicara untuk menilai keterangan dan untuk mengarah ianya dengan betul untuk mengikut undang-undang dan ketinggalan tersebut adalah terlepas pandang oleh Mahkamah Tinggi, Mahkamah Rayuan akan campur tangan dan untuk membetulkan ketidakadilan (lihat perenggan 27).]

Notes

For a case on account of deceased customer, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1799.
For a case on unjust enrichment, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) para 2864
For cases on administration of estate in general, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2217–2227
For cases on facts, finding of, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 898–1004
For cases on jurisdiction of the session court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6322–6324
For cases on trusts in general, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2471–2481

Cases referred to

Bannister v Bannister [1948] 2 All ER 133 (refd)
Belhaven & Stenton Peerage (1875) 1 App Cas 278 (refd)
Dubai Almunium Ltd v Salaam [2002] UKHL 48 (refd)
'Eurymedon', The [1942] 73 Lloyd LR 217 (refd)
Gan Yook Chin (P) v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1 (refd)
Guth v Loft Inc 5 A 2d 503 (refd)
Hon Kon Kim v Betsy Lim Gek Kim [2001] 4 SLR 340 (refd)
Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119 (refd)
McCormick v Grogan (1869) 4 App Cas 82 (refd)
Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 (refd)
Paragon Finance Plc v DB Thakerar & Co (a firm) [1999] 1 All ER 400 (refd)
Rediffusion (Hong Kong) Ltd v A-G of Hong Kong [1970] AC 1136 (folld)
Rochefoucauld v Boustead [1879] 1 Ch 196 (refd)
Sivapiran a/l Sabapathy v Lim Yoke Kong [1992] 2 MLJ 381 (refd)
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669 (refd)
Wong Siew Choong Sdn Bhd v Anvest Corp Sdn Bhd [2002] 3 MLJ 143 (refd)

Legislation referred to

Evidence Act 1950 ss 17, 18, 21
Limitation Act 1953 ss 2, 22, 22(1)(a), 22(1)(b), 29
Subordinate Courts Act 1948 s 69(e)
Trustee Act 1949

Appeal from: Civil Appeal No R1–12–573 of 2000 (High Court, Kuala Lumpur)

Zainur Zakaria (Ong Peck Ha with him) (Ong & Ong) for the appellants.
Eric Clement (Yogan Pathmanathan with him) (Siva, Thurai, Mariany & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This appeal raises an interesting issue of some importance. It has to do with question whether monies held in a joint account are held by the account holders as joint tenants or as tenants in common. The facts giving rise to this issue may be shortly stated.

[2] As long ago as September 1970, Koh Hooi Cheow (whom I shall refer to as the testator) opened a joint account with Bangkok Bank Limited in Singapore. The co-holders of that account were his sons Koh Heng Jin (the respondent before us) and Koh Heng Teik. The testator paid several sums into the account in question. Later, in the same month, the testator passed away. He left a will dated 25 March 1970. He named his widow and the respondent in this appeal as executors. The will made several bequests and left the residue to the widow. A few months after the testator's demise, that is to say, on 11 May 1971, Koh Heng Teik passed away. The respondent thereby became the only surviving holder of the account in question. He did nothing about the account for some ten years. Then, on 22 October 1981, he emptied the account. He withdrew all the money in it — a sum of S$346,505.09 — and kept it for himself. The testator's widow brought an action in the sessions court against the respondent to recover 1/3 of the monies that the latter had withdrawn from the joint account in question. She based her claim on an agreement entered into between the testator, the respondent and Koh Heng Teik that each shall be entitled to a 1/3 share of the sum in the joint account. That share, she contended, formed part of the residue, and, as the residuary beneficiary, she was entitled to it. The 1/3 share claimed by her amounts to S$115,501.70.

[3] The defendant answered this claim in three ways. First, he said that the sessions court had no jurisdiction to try the action. Second, he said that there had been an agreement between the three account holders that the survivor was to have the monies in the account. Third, he said that the action was barred by limitation. I will take each of these points in turn.

[4] Before I deal with the substantive merits of the respondent's objection to jurisdiction I should perhaps say a word about the court's approach to such a question. It is an established proposition that whenever a determination has to be made as to a court's jurisdiction, the truth of the matters alleged in the statement of claim or other pleading must be assumed to be true. I need go

no further than to quote from Lord Diplock's judgment in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136, Lord Diplock said:

> Since lack of jurisdiction has the consequence that the court has no right to enter upon the enquiry as to whether there exist a state of facts which would entitle the court to grant to the plaintiff the relief sought, the jurisdiction summons can succeed only if it is shown that no matter what were the facts that the plaintiff would be able to establish, relating to the subject matter of the dispute, the court would have no power to grant relief of the kind sought against the defendant.

So, in the present case, in determining whether the sessions court had jurisdiction over the appellant's claim, it must be assumed that all that is set out in the statement of claim accompanying the summons is true. In other words, it must be assumed that there was an agreement as alleged and that the respondent held the testator's share in trust.

[5] Now, the respondent's objection to jurisdiction rests on s 69(e) of the Subordinate Courts Act 1948. The section — with special reference to para (e) — says that a sessions court 'shall have no jurisdiction in actions, suits or proceedings of a civil nature to enforce trusts'. The respondent's case is that the widow was seeking to enforce a trust because she claimed that he (the respondent) acted in breach of trust by appropriating her residuary interest, namely, the 1/3 share. The question is whether the widow was enforcing a trust in seeking to recover monies she says belong to her. I think she was not. A trustee who uses a beneficiary's money has to account to the latter for it. Similarly, a solicitor who appropriates his or her client's money is a fiduciary who must account for it to the client. An action, by the beneficiary in the first illustration and by the client in the second, does not enforce a trust but is merely aimed to recover monies as had and received by the defaulting defendant. It is restitutionary relief based on unjust enrichment. In the words of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669:

> The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay: *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, pp 63–64, per Lord Wright; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 227, 255; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, at p 578C; *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70. In my judgment, Your Lordships should now unequivocally and finally reject the concept that the claim for moneys had and received is based on an implied contract. I would overrule *Sinclair v Brougham* [1914] AC 398 on this point.

[6] Equity is uncompromising in the requirement that a fiduciary or indeed any wrongdoer cannot keep the proceeds of his wrongdoing. As Layton CJ

A said when delivering the judgment of the Supreme Court of Delaware in *Guth v Loft Inc* 5 A 2d 503, at p 510:

> The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.

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[7] In my judgment, the words 'enforce trusts' in s 69(e) refer to an action C by a beneficiary or beneficiaries, as the case may be to compel trustees to perform the terms of the particular trust or settlement or to direct them to refrain from doing anything that it is inconsistent with the terms of a trust. Our High Courts, like the Chancery Division of the High Court in England exercises a supervisory power over trusts to ensure that they are properly D administered. It may have to do with the sale of trust property or the payment out of income from a capital asset to beneficiaries. But what those words certainly do not refer to is an action by the true owner to recover monies wrongly appropriated by a person whom equity holds accountable. For reasons that will become clear in a moment, the respondent is not a trustee E of the monies he took from the joint account. He is a person who is accountable in equity to the appellant for the monies belonging to the testator. Accordingly, the sessions court had jurisdiction over the subject matter of the appellant's claim.

F **[8]** Before I move to the second issue, there is an observation that must be made. It has to do with the appellant's assertion raised in the jurisdictional context that the respondent is a *constructive* or an *implied* trustee of the testator's 1/3 share of the monies in the joint account. In my judgment, it is not correct to describe the respondent as a 'constructive trustee'. G A constructive trustee is one who holds property under a trust constructed by the law. That is to say — unlike an express trust — it is imposed by law upon a person against his or her will. As Lord Browne-Wilkinson said in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*:

H > Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion.

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[9] A constructive trustee is to be distinguished from a person who is under a duty imposed by equity to account to the true owner of money or property that he has unlawfully acquired or has dishonestly assisted another to

unlawfully acquire. Such a person is neither a fiduciary nor a trustee in the true sense. An important difference between the two is that a constructive trustee holds his title in favour of the beneficiary while a person liable to account in equity asserts a title that is adverse to the true owner. This important difference between a constructive trust and a duty to account in equity — overlooked by many — was brought out by Lord Millet in two cases. The first is *Paragon Finance Plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400; the second is *Dubai Almunium Ltd v Salaam* [2002] UKHL 48.

[10] In *Paragon Finance*, he said this as a Lord Justice of the Court of Appeal:

> Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.
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> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well known examples of such a constructive trust are *McCormick v Grogan* (1869) 4 App Cas 82 (a case of a secret trust) and *Rochefoucauld v Boustead* [1897] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v Morgan* [1953] Ch 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.
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> The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the

plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief': *Selangor United Rubber Estates Ltd v Cradock* [1968] 1 WLR 1555 at p 1582 per Ungoed-Thomas J.

[11] The illustrations of a constructive trust given by Millet LJ in the foregoing passage are cases where property was acquired lawfully in circumstances in which his or her conscience was bound by the rights of another or others but was later sought to be appropriated by the acquirer for himself through unconscionable conduct, that is to say, equitable fraud. In *McCormick v Grogan* there was an attempt to use statute (the Statute of Wills in that case) as an instrument of fraud. So too in *Rochefoucauld v Boustead* [1897] 1 Ch 196. *Bannister v Bannister* [1948] 2 All ER 133 and *Hon Kon Kim v Betsy Lim Gek Kim* [2001] 4 SLR 340 are other examples where statute was used as an engine of fraud. These are merely cases that fall under one category or class of constructive trusts. Another is the case of a vendor of property upon whom a constructive trust is imposed in the purchaser's favour after a specifically enforceable contract of sale has been entered into. See, *Wong Siew Choong Sdn Bhd v Anvest Corp Sdn Bhd* [2002] 3 MLJ 143.

[12] The contention by the appellant that the respondent holds the monies in question under an implied trust is also not correct. The label implied trust encompasses both resulting and constructive trusts. As I have already said, the instant respondent is not a trustee at all. According to the appellant's pleaded case, the respondent unlawfully appropriated a 1/3 share in the joint account which belonged to the testator's widow as residuary beneficiary. He is therefore a person who is liable in equity to account for those monies to the appellant.

[13] Despite my criticism of the way in which the appellant's case was presented on the trust point, I must say at once in fairness to learned counsel for the appellant that there is at least some authority which appears to suggest that if X is to be held as a constructive trustee if he or she receives money or property knowing that it does not belong to him or her. See, *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, pp 473–474; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

[14] I now turn to the second issue. It is whether the monies in the joint account belonged solely to the respondent or whether the testator, the deceased Koh Heng Teik and the respondent each had a third share each in the monies in question. Now, when money is placed in a joint account in the names of two or more persons, then, in the absence of a contrary intention,

they hold it as joint tenants. (Let me add in parentheses that the expression 'tenant' is here not used in the context of the relationship of landlord and tenant.) It is an incident of a joint tenancy that upon the death of one of the joint tenants, his or her share goes to the survivor. This is known as the *jus accrescendi*. So, in the present case, in the absence of a contrary intention, the monies, upon the death of the testator and Koh Heng Teik, would accrue to the respondent as absolute owner.

[15] On the other hand, if an intention is disclosed that all the depositors are to have equal shares or shares in some other proportion, then the account holders will be deemed to hold the monies as tenants in common. In other words, the *jus accrescendi* is not a feature of a tenancy in common.

[16] The issue in the present case is whether the evidentiary material before the court of first instance disclosed an intention on the part of the testator to create a tenancy in common between himself and his two sons. There are, in my judgment, three telling pieces of evidence that support an agreement between the respondent and the testator that each account holder should have a 1/3 share in the monies. In the first place, there are the documents relating to the opening of the account which provide that the signatures of all three account holders were required for the monies to be withdrawn. In the second place, there is evidence that the probate in respect of the testator's will that had been obtained in this country was presented to the High Court in Singapore by the respondent for re-sealing. The respondent engaged solicitors in Singapore to have the re-sealing done. In the memorandum of re-sealing, there appears the following statement with regard to the list of the testator's assets in Singapore:

> 1/3rd share in the fixed deposit account No 1241 with Bangkok Bank Ltd in the names of Koh Hooi Cheow, Koh Heng Jin and Koh Heng Teik (1/3 of $191,000.00)

[17] It is common ground that the foregoing statement was inserted by the respondent's Singapore solicitor. It is therefore an irresistible inference that the respondent had instructed his solicitor that the testator was entitled to 1/3 share of sum of S$191,000, which of course did not include the accrued interest. This, in my judgment, amounts to an unqualified admission by the respondent under ss 17, 18 and 21 of the Evidence Act 1950. It is a strong piece of evidence in support of the appellant's claim.

[18] Last, but not the least is the respondent's conduct after the demise of his father and brother. If it were true that he, as survivor, was the absolute owner of the monies in the account, why then did he not draw those monies out at once? Why did he wait for more than 10 years before claiming the

monies to be his? The answer to these questions must be: because he knew that 2/3 of the money did not belong to him.

[19] Now if you take all these pieces of evidence; not as individual strands; but together the only reasonable and probable conclusion that may be arrived at is that the testator was entitled to 1/3 share of all the monies in the joint account. And that, in my judgment, is how evidence of circumstances must be interpreted. As Lord Cairns said in the case of *Belhaven & Stenton Peerage* (1875) 1 App Cas 278 at p 279:

> My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

[20] That brings me to the final line of the respondent's defence. To remind, it is whether the appellant's action is barred by limitation. The appellant met this defence with s 22(1)(b) of the Limitation Act 1953. That section in its entirety reads as follows:

> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

[21] The Limitation Act in s 2 says that the words 'trust' and 'trustee' 'have the same meanings respectively as in the Trustee Act 1949'. The latter Act defines 'trust' as follows:

> 'trust' does not include the duties of chargee, but with this exception the expressions 'trust' and 'trustee' extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of a personal representative and 'trustee', where the context admits, includes a personal representative, and 'new trustee' includes an additional trustee.

[22] For the reasons already stated, the respondent was not a constructive trustee. Neither was he a trustee under a resulting trust. He was a person who is accountable to the appellant in equity. This is because he appropriated the testator's 1/3 share of the monies in question knowing that they did not belong to him. As executor, he was a personal representative of his father's estate. He therefore falls within the broader definition of 'trustee' given by the Trustee Act 1949. There is no doubt that he converted to his own use monies not belonging to him. Accordingly, s 22(1)(b) applies and the plea of limitation must fail.

[23] In my judgment s 22(1)(a) applies equally to the facts of this case. The appropriation by the respondent of monies he knew to belong to the testator amounts at the very least to equitable fraud or unconscionable conduct. It is settled law that the word 'fraud' wherever it appears in the Limitation Act is not limited to actual fraud at common law but includes equitable fraud. In *Sivapiran a/l Sabapathy v Lim Yoke Kong* [1992] 2 MLJ 381, Eusoff Chin J said:

> What is the meaning of 'fraud' in s 29 of the Act? It may be helpful to look at the decisions of the English courts on the meaning of 'fraud', because s 26 of the Limitation Act 1939 (UK) is in pari materia with s 29 of the Act. The decisions of the English Court of Appeal in *Beaman v ARTS Ltd* [1949] 1 All ER 465; [1949] 1 KB 550 and *Kitchen v Royal Air Force Association & Ors* [1958] 3 All ER 241; [1958] 1 WLR 563 evolved two principles. First, fraud under s 26 of the Limitation Act (UK) does not necessarily mean deceit in the sense in which it is known in common law; and secondly, the type of conduct which amounts to fraud is the type of conduct which was known in the chancery court as equitable fraud.

[24] I accept that in *Sivapiran v Lim Yoke Kong* the court was concerned with s 29 of the Limitation Act. But fraud in s 29 cannot have a different meaning from fraud in s 22. The respondent having committed a fraudulent breach of trust (having regard to the wider definition earlier adverted to), no period of limitation applies.

[25] I must here add that if it is at any time accepted on what I most respectfully regard as the doubtful authority of Lord Browne-Wilkinson's speech in the *Westdeutsche* case relying on *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* that the respondent became a constructive trustee of the money belonging to the testator in the circumstances already recounted, then the appellant is of course entitled to rely on both limbs of s 22 on the trust ground and thereby to defeat plea of limitation.

[26] A careful reading of the record provided to us makes it amply clear that the sessions court and the High Court did not adequately direct their minds to the relevant evidence. Nor was there any proper evaluation of the

A cogent circumstantial evidence that went to establish the appellant's case. In fact, several important points in the case that supported the appellant's claim were overlooked or not sufficiently appreciated. Both courts below also misdirected themselves on the applicable law.

B **[27]** Learned counsel for the respondent urged this court not to intervene as the appeal concerns questions of fact in respect of which there have been concurrent findings. It is quite true that this court does not, as a general rule, interfere with findings of fact based on the credibility of witnesses. And more so where such findings by the court of first instance have been affirmed by the C intermediate court of appeal. But where, as here, an appellant is able to demonstrate a failure on the part of the trial court to evaluate the evidence and to direct itself correctly on the law and such omission is overlooked by the High Court, this court has ample jurisdiction to intervene and will do so to correct a miscarriage of justice. See, *The 'Eurymedon'* [1942] 73 Lloyd LR D 217; *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119; *Gan Yook Chin (P) v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1.

[28] For the reasons given, the appeal was allowed. The orders of the courts below were set aside and judgment as prayed for by the appellant in the E statement of claim was entered. Costs at all levels were awarded to the appellant and the deposit in court was ordered to be refunded.

Appeal allowed.

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Reported by Andrew Christopher Simon

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